No. 14564.

IN THE

United States Court of Appeals

FOR THE NINTH CIRCUIT

SEARS, ROEBUCK & Co., a corporation,

Appellant,

vs.

METROPOLITAN ENGRAVERS, LTD.; METROPOLITAN MAT SERVICE, INC.; GREGORY F. DUFFY, AUBREY A. DUFFY, ALFRED SMUTZ, WALTER C. DUFFY and FRANK R. BLADE,

Appellees.

PETITION FOR REHEARING.

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PETITION FOR REHEARING.

To the Honorable Circuit Judges Fee and Chambers, and District Judge Walsh for the United States Court of Appeals for the Ninth Circuit:

Petitioner, Sears, Roebuck & Co., respectfully petitions for a rehearing upon that portion of the judgment and opinion of this Honorable Court rendered November 27, 1956, in which the summary judgment in favor of defendant and appellee, Frank R. Blade, is affirmed.

This petition is presented upon the ground that petitioner earnestly believes that the affirmance of the summary judgment in favor of Blade was predicated upon an inadvertent misconception of the nature of the action

filed by petitioner in the court below against Blade and the Engravers.

In particular, the misconception appears from the following portions of the Opinion of this Court:

> "On December 10, 1951, Sears filed a complaint for money had and received in the Superior Court of the State of California in and for the County of Los Angeles against Blade and his sister and had a writ of attachment issued and levy made thereunder. * * * *In particular, the moneys for which the attachment issued are unquestionably in part the sums alleged to have been paid to Blade in the amended complaint in the federal suit, as an inspection of the bill of particulars in the state action will show.*
>
> "The general rule is that a plaintiff may pursue an action against an identical defendant in several courts at the same time, even though inconsistent remedies are sought. *But it is everywhere held that, although there can be several suits on the same state of facts against an identical defendant, there can be only one recovery. When a judgment has been based upon any of the several causes of action which can be stated arising out of the same state of facts, no recovery can be had as a matter of substantive law upon any of the other causes of action, whether prosecuted in the same court or some other court. The same rationale applies to a situation where affirmative action has been taken upon one of the several causes of action, which is thereupon held to negative any other theory of recovery between the same parties. This also is a doctrine of substantive law which has been adopted by many jurisdictions."**

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*Italics ours.

While it is true that petitioner in its amended complaint in the court below alleged in paragraph X that the Engravers had paid Blade as a rebate or bribe in excess of $50,000.00 [Tr. pp. 12-13], and while it is freely admitted that these are the monies recovered by Sears from Blade in the state court action, it is to be emphatically noted that the federal court action nowhere purports to seek recovery from Blade or from the Engravers of any part or portion of these secret rebates or bribes. Paragraph VIII of the amended complaint [Tr. p. 10] shows unequivocally that recovery is sought for an alleged over-charge for engraving made by Metropolitan Engravers in conspiracy with Blade in the sum of $141,979.95, and in paragraph IX of the amended complaint [Tr. p. 12] recovery is sought for alleged over-charges for engraving made by defendant Barnard Company in conspiracy with Blade in the sum of $20,021.50. The prayer of the complaint is for the recovery from the defendants of the sum of $162,001.45 (*i. e.* the sum of the two alleged over-charges), plus the additional sum of $250,000.00 as exemplary damages [Tr. p. 16].

Thus, in the state court action Sears recovered from Blade the secret bribes or comissions he had received, upon the ground, codified in Section 2860 of the California Labor Code, that "Everything which an employee acquires by virtue of his employment, except the compensation which is due to him from his employer, belongs to the employer, whether acquired lawfully or unlawfully, or during or after the expiration of the term of his employment." In the federal court action, recovery is sought from the Engravers and Blade, as alleged co-conspirators, of the over-charges for engraving to which Sears alleged it was subjected.

The Judgment in the State Court Action Is Not a Bar to This Action Against Blade.

The Opinion very correctly holds that "there was no splitting of a cause of action, even if the record in the two cases be assumed to be before this Court. An employer has a right of action against his employee for money acquired by the latter as the result of his employment. The employer also has a right of action for over-charges whereby a third party is unjustly and fraudulently enriched."

It being conceded in the Opinion that the employer has these two separate and distinct remedies or rights of recovery, and that they are not inconsistent one with the other, we believe the Court erred when it concluded that "although there can be several suits on the same state of facts against an identical defendant, there can be only one recovery. When a judgment has been based upon any of the several causes of action which can be stated arising out of the same state of facts, no recovery can be had as a matter of substantive law upon any of the other causes of action, whether prosecuted in the same court or some other court." We believe that the Court has inadvertently confused the doctrine of *res judicata* with the more limited doctrine of estoppel by judgment.

Perhaps no decision of the Supreme Court of the United States has been more frequently cited than *Cromwell v. County of Sac,* 94 U. S. 351, 24 L. Ed. 195, for its distinction between the effect of a prior judgment as a bar or estoppel. Mr. Justice Field in that case thus expressed this significant distinction (p. 197 of 24 L. Ed.):

"In considering the operation of this judgment, it should be borne in mind, as stated by counsel that there is a difference between the effect of a judgment as a bar or estoppel against the prosecution of a second action upon the same claim or demand, and its effect as an estoppel in another action between the same parties upon a different claim or cause of action. In the former case, the judgment, if rendered upon the merits, constitutes an absolute bar to a subsequent action. It is a finality as to the claim or demand in controversy, concluding parties and those in privity with them, not only as to every matter which was offered and received to sustain or defeat the claim or demand, but as to any other admissible matter which might have been offered for that purpose."

* * * * * * * *

"But where the second action between the same parties is upon a different claim or demand, the judgment in the prior action operates as an estoppel only as to those matters in issue or points controverted, upon the determination of which the finding or verdict was rendered. In all cases, therefore, where it is sought to apply the estoppel of a judgment rendered upon one cause of action to matters arising in a suit upon a different cause of action, the inquiry must always be as to the point or question actually litigated and determined in the original action; not what might have been thus litigated and determined. Only upon such matters is the judgment conclusive in another action."

It would be redundant to advert to the infinite number of subsequent decisions, both federal and state, in which this distinction, so succinctly drawn by Mr. Justice Field, has been cited and followed with approval. This Court, although citing *Corpus Juris* rather than *Cromwell v.*

County of Sac, in *Walrath v. Roberts,* 23 F. 2d 32, has recognized the distinction when it said, page 33:

> " 'A former judgment is not a bar to a subsequent action between the same parties if the subject matter involved in the two actions is not identical, although it may conclude the parties as to the issue actually litigated and determined. But identity of the subject matter is not alone a sufficient test. The true requirement is that the causes of action in the two suits shall be the same. Undoubtedly the subject matter involved in the two actions must be the same, for otherwise there could not be an identity of the causes of action; *but the same transaction or state of facts may give rise to distinct or successive causes of action and a judgment upon one will not bar a suit upon another.** Therefore a judgment in a former suit, although between the same parties and relating to the same subject matter, is not a bar to a subsequent action, when the cause of action is not the same.' 34 C. J. 811.
>
> " 'Where the causes of action are separate and distinct, the judgment in the first action is conclusive only as to matters actually in issue and adjudicated. Subject to the rule just stated, it is held that rights, claims, or demands of the parties growing out of the same subject matter, but which were not put in issue or adjudicated in the former action, are not barred by the judgment therein. And *a fortiori* a judgment is not a bar to the litigation of any demand or cause of action which, from the nature of the case, the form of the action, or the character of the pleadings, could not have been adjudicated in the former suit.' *Id.* 823."

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*Italics ours.

This distinction between a judgment as a bar or an estoppel is, of course, similarly the law of California.

29 Cal. Jur. 2d, "Judgments," Section 215, page 169:

> "There is a distinction between the effect of pleading a former judgment in bar and pleading it by way of estoppel. The first plea is available where the subsequent suit is between the same parties on the same cause of action, and its effect is more extensive than that of the plea of estoppel, since it is a complete bar to the second action regardless of what may or may not have been presented in support or defense of the claim in the prior action. As distinguished from the plea in bar, a plea of estoppel by judgment may be asserted in a subsequent suit on a different cause of action and is an estoppel or conclusive adjudication only as to issues or matters that were actually litigated and determined by the prior judgment. It is not conclusive as to matters that might have been but were not litigated in the original action. This distinction, though important because of the legal consequences, has not always been pointed out in the general statements and discussions of the doctrine of *res judicata,* nor recognized by parties litigant. And confusion has resulted from indiscriminate use of the term 'estoppel' as the equivalent of bar and merger."

Comment (a) to Section 68 of the Restatement, "Judgments," contains an excellent summation of the distinction:

> "It is important to distinguish the effect of a judgment as a merger of the original cause of action in the judgment or as a bar to a subsequent action upon the original cause of action from its effect by way of collateral estoppel in a subsequent action between the parties based upon a different cause of action. If a judgment is rendered in favor of the plaintiff, the

cause of action upon which the judgment is based is merged in the judgment, and the plaintiff cannot thereafter maintain an action on the original cause of action (see §47). If the judgment is rendered in favor of the defendant on the merits, the original cause of action is barred by the judgment (see §48). In either case the original cause of action is extinguished by the judgment no matter what issues were raised and litigated in the action, or even if no issues were raised or litigated and judgment was rendered by default.

"On the other hand, where the subsequent action is based upon a different cause of action from that upon which prior action was based, the effect of the judgment is more limited. The judgment is conclusive between the parties in such a case as to questions actually litigated and determined by the judgment. It is not conclusive as to questions which might have been but were not litigated in the original action. This is the doctrine of collateral estoppel." (Restatement, "Judgments," p. 293.)

Applying this rule of law to the present case and to the Opinion of this Court, it is apparent that the Court has applied the doctrine of judgment as a bar to a situation where admittedly the cause of action in the federal case is different from the cause of action upon which judgment was recovered against Blade in the state court. In such a case the judgment in the state court action would preclude a subsequent recovery against Blade upon a different cause of action, although arising out of the same state of facts, only if Blade's liability for the engraving overcharges had in fact been litigated and determined in the state court action, and again we reiterate at this point that the state court action upon a common count for money had and received was one solely to recover from Blade

the alleged secret bribes and rebates paid to him, while the federal court action is solely to recover for the tortious over-charges made by the defendant Engravers pursuant to their joint conspiracy with Blade to defraud Sears. As we pointed out at page 39 of our Opening Brief, it was necessary in the state court action to prove nothing more than the receipt by Blade of secret commissions and bribes. Whether or not the Engravers and Blade had wrongfully subjected Sears to over-charges for engraving was wholly immaterial to recovery in the state court action and was not there put in issue or litigated. [See, for example, the Complaint, Tr. pp. 38-39, and the Bill of Particulars, Tr. pp. 45-47]. By like token, in the federal court action it would be wholly unnecessary to prove the payment to Blade of secret commissions and bribes. It would be necessary only to prove that pursuant to a conspiracy between them, Blade and the Engravers wrongfully subjected Sears to the improper charges. Again we emphasize that no recovery is sought in the federal court action for anything other than these alleged over-charges.

If Sears establishes its allegations of conspiracy between Blade and the defendant Engravers to defraud, recovery of the damages suffered may be had against each of the participants in such conspiracy, regardless of whether such participant (Blade) profited from the fraud or not.

Anderson v. Thacher, 76 Cal. App. 2d 50, 72, 172 P. 2d 533;

Anglo-California National Bank v. Lazard (C. C. A. 9), 106 F. 2d 693, 703, cert. den. 308 U. S. 624, 84 L. Ed. 521;

B. F. Goodrich Co. v. Naples (D. C. S. D. Cal.), 121 Fed. Supp. 345, 348.

The causes of action against the employee, Blade, being wholly dissimilar although arising out of the same general transaction or state of facts, we submit that the present Opinion is in error in holding that the state court recovery against Blade is a bar to the maintenance of the present action against him.

There Is No Splitting of a Single Cause of Action.

What this Court is holding in substance in its Opinion in favor of Blade is that Sears could not split its cause of action against the defendant Blade and recover judgment against him in both actions, although admittedly the judgment in each would be for a different thing (*i. e.* payment to the employer of the secret commissions received by him during the course of his employment, on the one hand, and recovery by the employer of the damages sustained by it as the result of the alleged conspiratorial and wrongful over-charges for engraving, on the other hand).

The best exposition of the rule against splitting causes of action is contained in the opinion of this court in the second *Pan American* case, *United States v. Pan American Petroleum Co.,* 55 F. 2d 753, cert. den. 287 U. S. 612, a decision which we earnestly commend to the attention of the Court on this petition for rehearing. It was there contended by the defendant that the three leases before the court in the second *Pan American* case "constituted merely additional elements of relief to which the appellant was there entitled. Therefore, under the fundamental rule against splitting causes of action, the government, in this second suit, cannot recover under these three leases" (p. 765). This court gave extensive consideration to the rule against splitting causes of action, commencing at page

776, and observed that several causes of action may arise out of a single transaction, citing in support of this observation, among other authorities, *Cromwell v. County of Sac, supra.* At page 781 this Court applied the accepted test as to identity of causes of action, which is whether the same evidence which is necessary to sustain the second action would have been sufficient to authorize a recovery in the first; if so, the prior judgment is a bar, otherwise it is not. As we have observed above, evidence necessary to justify a recovery of a joint and several judgment against Blade and the Engraver defendants would not entail proof that Blade was paid or received secret rebates or commissions; nor, by like token, would it be necessary in the state court action, for the recovery of secret profits or commissions, to prove fraud or deceit on the part of the employee. *Savage v. Mayer,* 33 Cal. 2d 548, 203 P. 2d 9, "It follows that the principal's right to recover does not depend upon any deceit of the agent, but is based upon the duties incident to the agency relationship and upon the fact that all profits resulting from that relationship belong to the principal."

In addition to the "identity of evidence" test, this court in the second *Pan American* case also applied the test of finality of the judgment in the one action as a bar to the maintenance of the second action (p. 779):

> " 'Distinct causes of action, capable of being sued on separately and *successively*, may arise from one and the same tortious act in favor of the same plaintiff, as where he is injured thereby in respect to different rights or interests, * * *
>
> " 'But this rule does not require a plaintiff to join in one suit several distinct and separate causes of action which he may have against the same defendant,

> nor does it mean that the prior judgment is conclusive of matters not in issue or adjudicated, and which were not germane to, implied in, or essentially connected with, the actual issues in the case, although they may affect the ultimate rights of the parties and might have been presented in the former action. * * *
>
> " 'Where the causes of action are separate and distinct, the judgment in the first action is conclusive only as to matters actually in issue and adjudicated.' "

As we have shown above, Sears having separate and distinct rights (1) to recover from its employee the secret commissions paid to him, and (2) to recover for the wrongful over-charges for engraving to which it was subjected, the state court action would not be a bar to the maintenance of the federal court action except as to matters actually litigated and decided in the first action. As the rule is expressed in 1 Cal. Jur. 2d, "Actions," Section 76, page 703, "The test for determining whether the matter involved in two actions is the same is whether a final adjudication of the issue in the first action will constitute a determination of it in a second action." Under either test it must be clear that even though the perfidy of Blade and the Engravers be regarded as but a single and continuous transaction, two separate and distinct primary rights of Sears were invaded, namely, the right to recover the bribes received by its employee and the right to recover its losses occasioned by the fraudulent overcharges.

We are not unmindful of cases such as *Wulfjen v. Dolton,* 24 Cal. 2d 891, 151 P. 2d 846, and *Evans v. Hor-*

ton, 119 Cal. App. 2d 281, 251 P. 2d 1013, where following an unsuccessful action for rescission the plaintiff has sought to bring a second action for damages for fraud, based upon the same facts. As the *Wulfjen* case points out (p. 895), "The violation of *one primary right* constitutes a single cause of action, though it may entitle the injured party to many forms of relief, and the relief is not to be confounded with the cause of action, one not being determinative of the other." The simple fact is that two separate primary rights of Sears are here involved: (1) the right to have paid over to it compensation, other than wages, received by its employee during the course of his employment, and (2) the right to be free from fraudulent over-charges for its engraving work. Cases such as *Steiner v. Rowley,* 35 Cal. 2d 713, 221 P. 2d 9; *Estrada v. Alvarez,* 38 Cal. 2d 386, 240 P. 2d 278, and *Eistrat v. Brush Industrial Lumber Co.,* 124 Cal. App. 2d 42, 268 P. 2d 181, in which the levy of an attachment was held to constitute an election, were all actions—as we pointed out on pages 6-8 of our Reply Brief—in which the attachment was levied upon an alternative cause of action for the invasion of a single primary right. They are inapplicable here for the same reason upon which this Court in footnote 7 of its Opinion distinguished *Insurance Co. of North America v. Fourth National Bank,* 28 F. 2d 933, where the court observed that that case "concerned an election by plaintiff as to the manner in which he would pursue the same funds."

For the reasons hereinabove advanced, and because we sincerely believe the initial Opinion of this Court, as rendered, pertaining to the defendant Blade, is erroneous upon its face, we respectfully request a rehearing upon that portion of the judgment and Opinion affirming the summary judgment in favor of defendant Blade.

Respectfully submitted,

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Certificate of Counsel.

I hereby certify that in my judgment the foregoing petition is well founded, and I further certify that said petition for rehearing is not interposed for delay.

HUDSON B. COX,
for Newlin, Tackabury & Johnston.